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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of

Billed Party Preference  
for 0+ InterLATA Calls

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CC Docket No. 92-77

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**REPLY COMMENTS OF  
U S WEST COMMUNICATIONS, INC.**

Kathryn Marie Krause  
Suite 700  
1020 19th Street, N.W.  
Washington, DC 20036  
303/672-2859

Attorney for

U S WEST COMMUNICATIONS, INC.

Of Counsel,  
Laurie J. Bennett

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## SUMMARY

U S WEST supports those who echo the sentiments of Commissioner Quello that [Billed Party Preference] BPP is an “idea whose time has come -- and gone.” As such, we now join the substantial and overwhelming ranks of those categorically opposed to the implementation of such an access/billing scheme.

BPP is not in the public interest. It is unnecessary in the current marketplace, as consumers clearly have multiple carrier access options today. And, those consumers are exercising their options in an increasingly bully manner. The current marketplace is reflective of the richness of supplier creativity and the flexibility of real-time customer choice. BPP would only operate as a detour on the road to further technological and marketplace dynamism.

BPP, by requiring LECs to expend scarce resources on a massive telecommunications access and billing infrastructure, will only depress LEC investment in other, more market-driven technologies and services. The extent of such depression will be directly correlated to the ultimate price tag extracted by BPP. And, as the filed comments make clear, that price tag is far from well understood, and can only be expected to increase over time.

Whatever those costs turn out to be, U S WEST does not believe they will result in a “few cents” per call being added to the consumer marketplace. Rather, the BPP per-call surcharge has the potential to be large, creating an actual impediment to its very usage. Attempts to defeat that surcharge through broad-based cost

recovery mechanisms would work at cross purposes with both economic rationality and marketplace equity.

In essence, there is virtually nothing positive to say about BPP at this point in time. It represents a multi-faceted, multi-carrier telecommunications infrastructure investment of massive proportion, benefiting primarily those calling customers (and potential calling customers) who either cannot or do not currently use access or bypass codes in conjunction with their away-from-home dialing. It is quite possible that the entire BPP infrastructure might well be created not for the majority of away-from-home callers, but for those who never become such callers or who do so only occasionally.

For those away-from-home callers with more sophistication or with more frequent calling needs, rational consuming behavior suggests that they will gravitate to the calling option or service that provides the service at the best price. BPP calling certainly will not be it.

The Commission should terminate this BPP proceeding, finding that BPP is no longer in the public interest.

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- I. U S WEST COMMUNICATIONS, INC. ("U S WEST"), JOINS THE  
SUBSTANTIAL RANKS OF THOSE OPPOSED TO BILLED PARTY  
PREFERENCE ("BPP")

U S WEST supports those who echo the sentiments of Commissioner Quello  
that [Billed Party Preference] BPP is an "idea whose time has come -- and gone."<sup>1</sup>  
As such, we now join the substantial and overwhelming ranks of those categorically  
opposed to the implementation of such an access/billing scheme.

BPP, which for its success and cost recovery is totally dependent on customer  
calling patterns that the Federal Communications Commission ("Commission") can  
neither accurately predict nor control, has the potential to become a technological  
White Elephant. It is highly questionable whether a BPP offering will actually sell  
in a dynamic consumer marketplace, one currently well versed in exercising away-

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<sup>1</sup>See Colorado PUC at 2; Bell Atlantic at 2 (both citing Commissioner Quello's Separate Statement,  
June 6, 1994). See also Teltrust at i, 1-2.

from-home carrier selections. Yet there is no question that its implementation will significantly and materially drain the resources of those businesses attempting to meet real and immediate marketplace demand. BPP has the potential not only to strain resource allocations, but to strand resources, as well. In essence, confiscation of local exchange carrier ("LEC") property is a real possibility should BPP be implemented along the lines suggested by the Commission.<sup>2</sup>

Under the most speculative claim of "customer convenience," the Commission could well, albeit with the best of intentions, engage in a confiscation of LECs' property (or, at a minimum, in a squandering of scarce resources). If the Commission's predictive judgment with respect to consumers' willingness to pay for BPP convenience is faulty, an entire telecommunications infrastructure will have been erected in service of some phantom market demand. And, the "evidence" so far submitted in this proceeding is no cause for confident prediction.

Under these circumstances, it can only be declared as bewildering that the Commission continues to support BPP. As noted by various commentators, the response to the Commission's original Notice of Proposed Rulemaking<sup>3</sup> was overwhelmingly negative.<sup>4</sup> While U S WEST clearly understands that no Commission

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<sup>2</sup>See, e.g., CBT at 5-7; SNET at 7-8.

<sup>3</sup>In the Matter of Billed Party Preference for 0+ InterLATA Calls, Notice of Proposed Rulemaking, 7 FCC Rcd. 3027 (1992) ("BPP Notice").

<sup>4</sup>See, e.g., Teltrust at 2-5; Polar/Digital at 1; CNS at 6-7; LDDS at 1; ACTA at 2. In 1992, U S WEST was "dubious, at best, about implementation of BPP[.]" questioning "whether 'the asserted benefits of billed party preference would outweigh the related costs, particularly in light of legislation and Commission rule amendments aimed at eliminating end user inability to gain access to the carrier of choice.'" Teltrust at 2-3 (quoting from Comments of U S WEST Communications, Inc. Concerning

proceeding is necessarily to be determined by a majority vote of the commenting parties, it is more than mildly disturbing that the Commission has rejected, almost out of hand, the positions of those parties opposing BPP.<sup>5</sup> The grounds for those oppositions have only become more demonstrable -- not less.

While BPP may have had some merit back when it was first conceived within the context of the Modification of Final Judgment ("MFJ"),<sup>6</sup> and undoubtedly was worthy of some consideration back in 1987-88 when Ameritech<sup>7</sup> and Bell Atlantic initially raised the issue with the Commission,<sup>8</sup> and maybe even had some merit back in 1992 when the Commission first formally noticed the matter in its original BPP Notice, any merit the idea had is no longer demonstrable. Today, in mid-1994, there is no justification for proceeding with a proposal that is obviously tremendously expensive and that will only get more so; patently presents, at best, a precarious chance at cost recovery; is not supported by the interexchange carrier ("IXC") with the largest share of interstate traffic; and appears unnecessary to

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Billed Party Preference, filed herein July 7, 1992 ("U S WEST Comments")). Furthermore, even then U S WEST was categorically opposed to BPP "[u]nless LECs [could] be assured of full recovery of total unseparated implementation costs[.]" U S WEST Comments at 19. The Commission's instant Further Notice of Proposed Rulemaking does nothing to alleviate U S WEST's concerns. In the Matter of Billed Party Preference for 0+ InterLATA Calls, Further Notice of Proposed Rulemaking, 9 FCC Rcd. 3320 (1994) ("FNPRM").

<sup>5</sup>See, e.g., LDDS at 1-2 (noting that the Commission's continued attraction to BPP is surprising, given other available options); ACTA at 5-9; NTI at 4.

<sup>6</sup>See U.S. v. Western Elec. Co., Inc., 698 F. Supp. 348 (D.D.C. 1988).

<sup>7</sup>Ameritech at 2.

<sup>8</sup>Bell Atlantic Petition for Rulemaking to Establish Uniform Dialing Plan from Pay Telephones, RM-6723, filed Apr. 13, 1989. See also BPP Notice, 7 FCC Rcd. at 3028 ¶ 9.

provide for substantial customer choice with respect to interstate carrier and operator services access.

The Commission should declare pursuit of BPP no longer in the public interest, and it should terminate this proceeding.

A. The Most Fundamental Flaw with BPP as Proposed by the Commission is its Disassociation from Current and Future Market Behaviors and Impending Technologies

BPP is, quite simply, antithetical to where the marketplace is going. Whatever temporal, incremental customer “convenience” it theoretically might offer, it is a regime based on consumer decisionmaking in the absence of (or significantly separated in time from) actual consumption. And, it is dependent on cumbersome and expensive LEC service-order-driven systems. Its essential flaw is that it is a hard-wired solution to a fundamentally dynamic action -- calling when away from home.<sup>9</sup>

Rather than imposing the 1+ presubscription model on such a dynamic marketplace, the Commission should encourage the development of technologies that increase the ability of consumers to make dynamic real-time choices with respect to each and every interstate call (or series of calls) they make. Ideally, callers should be able to choose, on each call, who his/her carrier of choice will be for that call.

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<sup>9</sup>Compare similar observation of USLD at 1.

Increasingly sophisticated voice activation technologies, for example, take such a calling environment out of the realm of fantasy and into the telecommunications/computer world of real-time choice.<sup>10</sup> Calling debit cards allow consumers to dole out an increment of calling to a single carrier, based on an attractive price for the package.<sup>11</sup> 800 calling offerings allow consumers, in response to the ad of the day, to switch their calling behaviors based on their perception of the best deal at the moment.<sup>12</sup> Other easy calling options are increasingly available.<sup>13</sup>

Indeed, a compelling argument is made that the current market environment already provides for BPP -- just of a type different than that defined by the Commission.<sup>14</sup> The BPP of the current marketplace is not one achieved through an expensive and cumbersome billing and network infrastructure investment, but one achieved through marketplace initiatives. Current customer calling behaviors already evidence BPP options, demonstrating the richness associated with dynamic, real-time customer choice.

And, certain impending technologies suggest that, in the future, equally dynamic real-time choices will be available with respect to 1+ calling,<sup>15</sup> as well.

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<sup>10</sup>See, e.g., CompTel at 29-30.

<sup>11</sup>See, e.g., LDDS at 8; Bell Atlantic at 11; BellSouth at 17; CNS at 7-10; NTI at 4-5; USOC at 6 (pre-paid calling market).

<sup>12</sup>See, e.g., Teltrust at 2; Bell Atlantic at 9-10; BellSouth at 4, 16; Rochester at 1-2; AT&T at 8; Intellicall at Summary, 13-15; USOC at 5, 14, 16-17.

<sup>13</sup>See BellSouth at 16-17 (describing Sprint/VISA joint venture offering "10 VSA").

<sup>14</sup>See TCG at 2-7; Rochester at 1-2; AMNEX at 8-10.

<sup>15</sup>Personal Communications Services ("PCS") will increase this aspect of the calling market, while

Rather than a permanent “presubscribed” 1+ carrier, customers may be able to just speak the name of their preferred carrier for that particular call. Real-time 1+ carrier selection is on the horizon.

Rather than hard wiring 0+/- calling consumers into a 1+ presubscription model, the Commission should encourage the investment and deployment of those technologies that will allow all customers, on any given call -- whether from home or away from home -- to choose their carrier of choice for that particular call. This is the best bang for the buck -- not the investment of scarce resources in BPP.

BPP feeds into the intransigency of processes where consumers make decisions months, sometimes years, in advance of actual consumption. Carriers are required to absorb huge costs -- not in product innovation or creativity, better market delivery, or customer service but -- in designing and deploying systems to “keep track” of dated choices, some of which might never even be exercised.<sup>16</sup>

Contrary to the Commission’s expectation that “the technology required for BPP would enrich the nation’s telecommunications infrastructure, paving the way for further network innovation,”<sup>17</sup> the dedicated nature of the BPP technology<sup>18</sup>

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decreasing the 0+/- market. There will be no need to make 0+/- calls when a caller carries with him/her an already “presubscribed” station. See note 47, infra.

<sup>16</sup>The FNPRM states that BPP “would eliminate the need for access codes and guarantee routing by the billed party’s preferred carrier.” FNPRM, 9 FCC Rcd. at 3322 § III(A)(1). This is an incredible overstatement about a fundamental factual issue in this proceeding. While BPP may eliminate the “need” for some access code dialing (see, note 58, infra, regarding the limited scope of BPP functionality, in any event), it would certainly not eliminate the behavior (assuming some economic advantage to its continuation). And, it would not “guarantee” -- at any given moment -- that a consumer would reach its “preferred carrier” for that moment. It would only assure that a choice made months previously was accorded a default status.

<sup>17</sup>FNPRM, 9 FCC Rcd. at 3320 ¶ 2. And see id. at 3324-25 ¶ 17. Compare id. at 3328 ¶ 37 (“BPP

renders it unsuitable as a broad-based, infrastructure-enriching investment. Every dollar spent on the development and deployment of BPP is a dollar not spent on other infrastructure projects, such as the Advanced Intelligent Network (“AIN”) -- an investment with potential for significant marketplace dynamism and creativity.<sup>19</sup>

**B. The Market Environment is Such that BPP is No Longer a Logical or Compelling Solution. There is Little “Problem” Left to be Solved by its Deployment.**

The absolute need for, and therefore the putative “benefits” of, a BPP regime has decreased. And it will continue to decrease, over time. A Commission decision to implement BPP in light of facts such as those discussed below could only be deemed arbitrary and capricious.

1. BPP is clearly not necessary for customer “access” to preferred carriers. As the Commission has acknowledged,<sup>20</sup> and as numerous commentators have reiterated,<sup>21</sup> the Telephone Operator Consumer Services Improve-

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could represent a valuable improvement to the communications infrastructure.”).

<sup>18</sup>The Commission cites to no evidence, and, as far as U S WEST is aware, none has been offered, to support the Commission’s observation that OSS7 technology “could aid in the provision of other forthcoming services.” *Id.* at 3324-25 ¶ 17. *And see id.* at 3325 ¶¶ 22-23. A number of commentators confirm the fact that OSS7 technology will serve no other purpose than the deployment of BPP. *See* NYNEX at 8; Bell Atlantic at 12; CBT at 3; Ameritech at 9; BellSouth at 12; SWBT at 7; ONCOR at 32; Pacific at 2, n.1.

<sup>19</sup>*See, e.g.*, observations of Teltrust at 8; USOC at 16.

<sup>20</sup>*See FNPRM*, 9 FCC Rcd. at 3320-21 ¶¶ 3-4, n.5.

<sup>21</sup>*See, e.g.*, INS at 21-22; AMNEX at 8-10; Cleartel/Call America at 15; Bell Atlantic at 8; USOC at 1-2; USLD at 7; Polar/Digital at 14-16; ONCOR at 4, 41-42.

ment Act of 1990 ("TOCSIA")<sup>22</sup> and the Commission's implementing rules have resulted in access being available from 90% of away-from-home stations. This is a success story.<sup>23</sup> Real customer choice, i.e., access, is frustrated -- at most -- only 10% of the time. While BPP might add some "convenience" to calling from all stations, the convenience is clearly an incremental improvement, since (in the Commission's words) "some of the most serious problems"<sup>24</sup> associated with 0+ calling are no longer present.

2. As a result of increased carrier access opportunities, customers have become very familiar with access codes and other dial-around calling arrangements. Contrary to the Commission's expectation that dial-around calling will reach a 50 percentage mark in 1997,<sup>25</sup> such calling is at that percentage right now.<sup>26</sup> It can only be expected to increase over time, especially if BPP cost recovery surcharges applied to 0+ calls motivate callers to "look

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<sup>22</sup> See 47 CFR § 64.704 (1992), adopted pursuant to Pub. L. No. 101-435, 104 Stat. 986 (1990) codified at 47 USC § 226.

<sup>23</sup>U S WEST agrees with AMNEX that the Commission cannot have it both ways. As AMNEX (and others) has pointed out, the Commission reported to Congress on the success of TOCSIA in allowing for the exercise of customer choice. AMNEX at 8. And see Polar/Digital at 5; CompTel at 33-34. It was the creation of the TOCSIA choice that fostered the growth in use -- and promotion of -- access codes. See ONCOR at 5. A success does not become a failure because it is less than ideal or marginally inconvenient.

<sup>24</sup>See FNPRM, 9 FCC Rcd. at 3321 ¶ 4.

<sup>25</sup> See id. at 3323 ¶ 12, n.25 & Appendix B.

<sup>26</sup>See, e.g., NYNEX at 3-5; Polar/Digital at 3-5 (in recent sampling of non-sent paid calls, 67% were dial around); SNET at 4; Bell Atlantic at 9-10; AMNEX at 8-10; ONCOR at 5, 21; USOC at 1-2 (50% dial around, excluding 1-800 calls).

for the discount.” Additionally, even with the expanded record, there is scant evidence (itself subject to debate) that callers would trade off calling convenience for per-call savings on any individually-engaged-in dial-around call.<sup>27</sup>

3. While some small fraction of Operator Services Providers (“OSP”) might still engage in exorbitant charging to end users,<sup>28</sup> others have demonstrated that they provide valuable services to the public, to discrete businesses, and to the overall economy.<sup>29</sup> There are demonstrably less severe, and far less costly,<sup>30</sup> alternatives to BPP to further protect the public from exorbitant charging.<sup>31</sup> BPP, on the other hand, has the potential to eliminate reputable alternative OSPs from the market, causing certain ripple economic consequences that are inadequately factored into the Commission’s somewhat narrowly tailored cost/benefit charts and analyses.

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<sup>27</sup>See discussion below at Section III.A.3.

<sup>28</sup>See Polar/Digital at 14-16 (noting that the Commission itself has advised Congress that exorbitant OSP charging is minimal). See Final Report of the Federal Communications Commission Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990, rel. Nov 13, 1992, at 19-21 (“TOCSIA Final Report”). Compare FNPRM, 9 FCC Rcd. at 3321 ¶ 4, n.5 (“some calls are still routed to carriers that charge high rates.”) (emphasis added).

<sup>29</sup>See, e.g., Teltrust at ii, 6-8; Polar/Digital at 6-10; CNS at 11-16; Cleartel/Call America at 6; Intellcall at 3, 17-18; NTI at 5; ONCOR at 41; OSC at 3; Cherokee at 1; USLD at 10, 12-13. See also Bell-South at 7-8; Colorado PUC at 8.

<sup>30</sup>U S WEST suspects that LECs would be better off never collecting any revenue (i.e., writing off the debt) from customers claiming they were charged exorbitant fees rather than implementing BPP and betting on the consumer come. Compare FNPRM, 9 FCC Rcd. at 3324-25 ¶ 17. The former is a saner commercial action than the latter.

<sup>31</sup>See discussion below at Section V.

4. To the extent that AT&T is the largest 1+ provider, it can reasonably be anticipated that adoption of BPP would result in AT&T being the largest 0+ provider via any 0+ presubscription process.<sup>32</sup> There is no evidence in the record to suggest that customers will “bifurcate” their “presubscribed” carrier choices. Yet, there is every reason to believe that callers can and will dynamically change their 0+/- provider, as befits their situation at any given calling moment.<sup>33</sup>

5. While virtually all American consumers are assumed to make occasional 1+ calls, no such assumption pertains to 0+/- calls. Furthermore, all evidence suggests that 0+/- calling behaviors will decline in the future. PCS, automated voice dialing, debit cards, and unimagined (as of now) new technologies will continue to redefine the market. Yet, the Commission proposes a two-tiered presubscribed operator services option for consumers -- a model more costly, more cumbersome, and more irrelevant than it required for 1+ equal access calling. Such is obviously not a focused solution, even if

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<sup>32</sup>See, e.g., INS at 23-25; AMNEX at 17-18; CNS at 11-16; Cleartel/Call America at 5; Teltrust at 9-12; Intellicall at 24-26. See also FNPRM, 9 FCC Rcd. at 3327 ¶ 32, 3332 ¶ 67 (acknowledging that consumers might well presubscribe (or have defaulted) their 0+ traffic to their 1+ carrier).

<sup>33</sup>U S WEST recently conducted a review of our LIDB data for the last twelve months. It demonstrates a 20% shift in billed-to-third/collect traffic since the introduction of MCI's 1-800-COLLECT offering.

there is some current lack of market equilibrium. It is bound to be found by a reviewing court to be arbitrary and capricious.

Clearly, the record with respect to BPP deployment has gotten worse -- not better. The Commission should not order its institutionalization. Rather, the Commission should look with favor on the various market possibilities that are creating real-time customer choices. These choices are, by far, superior to hard-wired, service-order-driven choices that customers are required to make today in an effort to define and control their future calling needs -- regardless of what those needs might be.

II. THE COMMISSION'S COST/BENEFIT ANALYSIS SIMPLY DOES NOT SELL. DESPITE ITS ATTEMPTS AT MATHEMATICAL EXACTITUDE, ITS NARROW DEFINITION AND LACK OF LOGICAL FOLLOW THROUGH IS PROBLEMATIC. IT OVERSTATES BENEFITS THAT ARE DEPENDENT AND INCREMENTAL, IGNORES COSTS THAT ARE CERTAIN TO EXIST, AND IS ABSOLUTELY DEPENDENT FOR ITS ACCURACY ON AN ASSUMPTION FOR WHICH THERE IS SCANT RECORD EVIDENCE.

A. There are Not Three Separate Benefits Accruing From BPP. The Commission's Cost/Benefit Analysis Succeeds or Fails on its "Customer Convenience" Assessment. If That Aspect of the Commission's Analysis is Faulty, no Other Putative Benefits of BPP Will be Realized, and LEC Cost Recovery Will be Impossible to Predict With any Degree of Rationality or Reasonableness.

The Commission sees three benefits associated with BPP implementation: customer convenience, reduction of OSP charges (due to reduction of commissions to payphone premises owners and aggregators), and a reduction of AT&T's dominance

in the 0+ calling market.<sup>34</sup> The Commission discusses these benefits as if all three would be realized independently should BPP be deployed;<sup>35</sup> and implies that none will be realized without it.

At first glance, it may appear that a regulatory solution which “kills three birds with one stone” must be worth pursuing. Yet, a more exacting investigation of this philosophy demonstrates that the context in which the bird killing is being conducted is critical in order to determine the ultimate logical legitimacy of such approach. The model makes sense only if the “solution” actually kills the three birds independently, and without regard to the success of the first kill. Such cannot be said for BPP and its ultimate “problem-solving” capabilities.

The success or failure of BPP rides on what the Commission has acknowledged as its “principal benefit,” i.e., “simplified ‘dialing’” advancing customer convenience.<sup>36</sup> If BPP cannot prove itself on that ground, BPP will have created the most incremental of improvements with respect to each of the Commission’s goals, but it will have done so at a back-breaking cost to the industry. In essence, none of the birds will be killed -- they will all be wounded. It will require further Commission action to bring about their ultimate demise.

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<sup>34</sup>See FNPRM, 9 FCC Rcd. at 3320 ¶ 2, 3322 ¶ 9, 3327-28 ¶ 36.

<sup>35</sup>Id. at 3322 ¶ 9, n.18.

<sup>36</sup>Id. at 3328 ¶ 39.

As U S WEST discusses in greater detail below, the Commission has no solid evidence that customers find dialing access codes or using alternative dialing arrangements with respect to interstate 0+ calls as serious or material impediments to such calling.<sup>37</sup> While it may be more convenient to not dial such digits, the evidence is conflicting as to where on the list of priorities such convenience is or what price customers would be willing to pay for it. Any determination the Commission makes with respect to this issue is critical to the entire justification of BPP.<sup>38</sup> Yet, the Commission has neither the power nor the market control to assure the accuracy or reliability of its prediction.

Thus, the “principal benefit” the Commission sees from implementation of BPP may not be based on valid assumptions, in the first instance. The fact that -- if the “consumer convenience” assumptions are correct -- other benefits may flow (e.g., reduced commission payments, possible reduction of AT&T market share), is meaningful only if the primary assumptions are correct. If calling customers will not pay the freight for BPP, then none of the other “benefits” will flow: there will still be some OSPs that charge exorbitant rates and AT&T will still have a substantial share of the 0+ market (in large part because it has the lion’s share of the 1+ market, and customers will work to reach them).

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<sup>37</sup>See discussion below at Section III.A.3.

<sup>38</sup>The Commission indicates that customers are willing to pay “a few cents” for BPP calling convenience. See FNPRM, 9 FCC Rcd. at 3331 ¶ 58. This assumption may be correct. However, its validity is relevant only so long as the cost-recovery mechanisms ultimately adopted for BPP result in an increase of only a “few cents” to the price of a call. The Commission’s cost-recovery proposals do not begin to assure that such will be the case. See discussion below at Sections III.A.3. and IV.

Thus, it is logically illegitimate to claim that BPP will achieve three separate “benefits,”<sup>39</sup> because it can do so only if the Commission is correct about the marketplace’s willingness to pay for customer convenience -- a single benefit. And, that is a sixty-four million dollar (or 1-2 billion dollar) question.<sup>40</sup>

On the other hand, the Commission need not create such a dependent “benefit pyramid,” where all rises or falls on a single, successfully completed foundation. It can achieve incremental changes with respect to its other identified benefits without regard to BPP. It can, for example, allow the marketplace to continue its creative responses to away-from-home calling situations; it can cap OSP rates;<sup>41</sup> and it can -- if it deems it a substantial enough problem -- address AT&T’s market dominance in the 0+ market (if there really is any), through a separately targeted proceeding.<sup>42</sup> Attacking each “problem” serially does not pose the kind of risks associated with attacking them as a single “problem” putatively solvable by BPP.

When none of the Commission’s individually identified goals can demonstrably support the costly infrastructure of BPP on its own, and when a verifiable and viable solution with respect to each is either already evident in the marketplace or

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<sup>39</sup>See FNPRM, 9 FCC Rcd. at 3322 ¶ 9.

<sup>40</sup>See discussion below at Section III.A.3.

<sup>41</sup>See discussion below at Section V.

<sup>42</sup>See Bell Atlantic at 14-15; BellSouth at 9-11; INS at 4-8; LDDS at 10-11; TCG at 2-7; CNS at iii-iv, 35-37; Intellicall at 16-17; NTI at ii, 10, 17-19; ONCOR at 42; Polar/Digital at 16-17. And compare FNPRM, 9 FCC Rcd. at 3321 ¶ 4, n.7, 3328 ¶ 38.

can be achieved with far less costly alternatives, it becomes very difficult to argue that somehow -- in combination -- the putative (and continuing debatable) benefits of a massively costly BPP infrastructure are evident. In a situation in which the Commission claims to secure multiple benefits from a single solution, judicial review will certainly require that the benefits arguably appropriated from the solution be predictable on the basis of their own realization, not on their dependence to some prime-mover "benefit." Alternatively, the deference normally accorded by an appellate court to the Commission's predictive judgment would be less generously applied with regard to the primary or fundamental benefit than is usually the case.<sup>43</sup>

B. Even the Mathematics of the Commission's Cost/Benefit Analysis are Suspect

As NYNEX, AT&T and others persuasively demonstrate, the Commission's BPP cost/benefit analyses are flawed in a number of particulars.<sup>44</sup> The Commission's assumptions regarding dial-around calling are unreasonably low and contrary to the trend evidence presented to the Commission in this portion of the proceeding.<sup>45</sup> The Commission's expected savings from the OSP segment of the industry

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<sup>43</sup>See ACTA at 2.

<sup>44</sup>See generally NYNEX at 3-13; AT&T at 3-22; Cleartel/Call America at 3-5; CompTel at 5-19; Colorado PUC at 9-10.

<sup>45</sup>See NYNEX at 3-6 (the Commission assumes a dial-around rate of 50% in 1997; such is an unreasonable assumption in that dial-around traffic rates are already in 1994 close to, and often exceed, 50%); Bell Atlantic at 8-9 (dial-around traffic was recently measured, by phones that could measure, to be at 55%), 9, n.17 (59% of calling card customers have used access codes); ONCOR at 5 (dial-around traffic has reduced its traffic by up to 50%), 21 (by 1997, it will be 75-80%); Polar/Digital at 3

(i.e., reduced commissions to aggregators) will more than be re-captured in the aggregators' cost of goods sold and the OSP advertising requirements.<sup>46</sup> And, the Commission's current analysis is devoid of the potential impact that PCS will have on the future of public calling and OSP services.<sup>47</sup> As one carries one's phone around with him/herself, 1+ calling will undoubtedly increase; and "public" calling behaviors will wane accordingly. All of these factors add up to a tremendously overstated "benefit" with respect to the deployment of BPP.

The Commission's cost assumptions are equally tenuous. As has been recognized, the legitimacy of even the figures currently cited by the Commission with respect to BPP deployment are extremely suspect.<sup>48</sup> They are a far cry from com-

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(in recent sampling of non-sent paid calls, 67% were dial around). Compare Ameritech at 8, n.12 (of calling card customers, 55% had used access codes by March, 1994; and of those using such codes, they used them 63% of the time).

<sup>46</sup>See NYNEX at 5-6 & n.5; Bell Atlantic at 5-6; AT&T at 13; ONCOR at 22.

<sup>47</sup>Indeed, the Commission has specifically asked for this kind of information as part of the instant proceeding. See FNPRM, 9 FCC Rcd. at 3325 ¶ 18. It appears that the impact of PCS is quite substantial on the future of public calling and the need for operator services. See NYNEX at 7-8 (suggesting a 50% decrease in public calling within five to seven years of PCS deployment, relying in part on a 1992 Cellular Telecommunications Industry Association ("CTIA") Study). See also Bell Atlantic at 11; SNET at 4; BellSouth at 18.

Since the filing of the opening comments, CTIA has released its semi-annual survey of industry growth. That survey shows that from July 1993 to June 1994 the number of cellular subscribers grew by more than six million (or 48%). The number of subscribers in the first six months of 1994 grew by 3.3 million -- the largest half-year increase ever. According to CTIA President Thomas Wheeler, "More than 17,000 new cellular customers are added each day."

<sup>48</sup>See FNPRM, 9 FCC Rcd. at 3325 ¶ 20. Indeed, in Appendix C of the FNPRM, the Commission shows U S WEST's Total Costs, "Non-recurring," and "Recurring." We cannot determine how the Commission arrived at the "Recurring" figure it cites for U S WEST, vis-à-vis its reference source of our August 16, 1993 ex parte. While we can identify the \$149.9 Non-recurring in the Total Costs column to that which we identified for the Commission, we cannot determine why the Commission shows our Total Recurring charges as only \$27.8, when we represented them to be \$45.1 (subtracting the amortized non-recurring expense).

plete, current, or verifiable.<sup>49</sup> The cost calculations do not include the inflationary costs associated with BPP implementation;<sup>50</sup> understate the costs for independent LEC deployment;<sup>51</sup> and ignore costs associated with changes in the current network numbering environment,<sup>52</sup> as well as overhead loadings.<sup>53</sup> In many cases, they also did not originally include substantial balloting and service order costs.<sup>54</sup> For balloting and service order processing costs alone, U S WEST would incur (in addition to those costs already identified to the Commission) costs of \$29.7 million dollars.

The Commission's cost/benefit analysis is also inappropriately monocular. No longer can the Commission look at potential investment decisions as though they were discrete stand-alone decisions, i.e., should these dollars be spent on this investment. Rather, the Commission must become more binocular in its approach.

Implementation of BPP would represent nothing more than a significant and material capital and expense drain on companies that have more immediate market and regulatory initiatives that need attention. In the current environment, the Commission cannot, through the process of a single service cost/benefit analysis,

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<sup>49</sup>See ONCOR at 7; Polar/Digital at 10-14.

<sup>50</sup>See NYNEX at 9.

<sup>51</sup>See id. at 10-11; USTA at Summary and 3-10; CBT at 2-3; SNET at 5-8.

<sup>51</sup>See NYNEX at 11-12.

<sup>52</sup>See Bell Atlantic at 12-13; AMNEX at 4-5; Intellicall at 8.

<sup>53</sup>See AT&T at 20; AMNEX at 4-5; CompTel at 5-19; ONCOR at 8; Polar/Digital at 10-14; USLD at 6.

<sup>54</sup>See AT&T at 20; Colorado PUC at 12; AMNEX at 4-5; CompTel at 5-19; ONCOR at 9; Pacific at 6, n.8; Polar/Digital at 10-14; BellSouth at 14 & Appendix A.

make an educated determination of the overall propriety of going forward with any single offering. Rather, the Commission must address the “lost opportunity” aspects of its decisions -- especially those requiring the investment of billions of dollars.

As the Commission insinuates itself into the management decisions of companies by declaring what services it deems necessary to fulfill the public interest,<sup>55</sup> it must begin to pay greater attention to, and demonstrate a more sophisticated appreciation for, the “opportunity foregone” cost of investing in Project X. In most situations, investing in Project X (especially those that carry the kind of price tags suggested by BPP) will necessarily mean not investing in some other Project -- perhaps one with an even more compelling demonstration of benefit (within the context of its own discrete cost/benefit analysis) than the one currently subject to the Commission’s “instant” consideration.

For example, PCS, AIN, the Network Information Infrastructure (“NII”) and Video Dialtone (“VDT”) investments are themselves public interest projects which carry hefty investment price tags. As commentators point out,<sup>56</sup> it does not make

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<sup>55</sup> Sections 214(d) and 201(a) of the Communications Act clearly provide the Commission with authority to mandate common carriers to provide services under certain circumscribed conditions. In this respect, the Commission can override the general model of the Communications Act, which is based on the proposition that carriers define service offerings. See, e.g., American Telephone and Telegraph Company v. FCC, 487 F.2d 865, 872-73 (2d Cir. 1973). However, when the Commission does intervene in this way, it must realize that it has assumed the mantle of management in directing where scarce resources are to be dedicated. It should have not only a compelling reason for acting in such a capacity, but it should be held to a similar standard of care and review as those officers and directors of the corporation who otherwise make such investment decisions. Such standard of care requires that investment decisions not be made in a vacuum. See SNET at 9.

<sup>56</sup>See id. at 2, 8-9; INS at 9.

sense, from either a regulatory or public interest perspective, to diminish the monetary resources available for such projects by requiring that such resources be spent on tenuous projects with marginal, incremental -- and undoubtedly short-lived -- public benefit.

It is even more questionable to order the consumption of such resources where the Commission lacks the ability to reasonably predict, let alone assure, cost recovery for the consumption. Where, as here, the ability to recover the costs of an investment rest solely with the behaviors of consumers in the marketplace, the predictable behaviors of those consumers must be proven to a fairly high level of confidence and proof. And the Commission's forecast regarding ultimate cost recovery by the investor LECs must similarly be supported by economic logic and statistical confidence. Neither is the case with BPP.

The Commission, clearly, cannot control consumer dialing patterns. Given that impossibility (even were an inclination present, which it is not),<sup>57</sup> the Commission cannot reasonably predict -- let alone assure -- cost recovery of any BPP investment.

The Commission's decision not to prohibit dial-around calling (as if it could, by regulatory fiat, change a market behavior) and presumably its promotion<sup>58</sup>

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<sup>57</sup>The Commission has determined that it is not appropriate for it to deprive consumers of dial-around options. See FNPRM, 9 FCC Rcd. at 3334 ¶ 82. It never discusses the fact that it could not possibly do so.

<sup>58</sup>As certain commentators point out, the fact that BPP will not necessarily be available with respect to all interstate 0+/- calling (not to mention that there is no assurance that state regulatory bodies will ever find BPP attractive) means that vendors will continue to recommend that consumers dial around, so as to assure that they reach their vendor of choice in all circumstances. See LDDS at 6-7;

means that the Commission must attempt to capture some of the costs associated with “BPP calling” from those who engage in dial-around calling. Otherwise, no workable cost recovery model can be implemented. And, if the Commission does order the costs be spread across such calls, the Commission would be adding costs to the calls of those who affirmatively chose not to utilize the BPP dialing pattern at all, in part because they desired to take advantage of the cheaper rates associated with dialing around.<sup>59</sup> Such a cost-recovery mechanism takes on punitive aspects, and its success must be deemed less than predictable.

### III. WHAT PRICE CONVENIENCE?

#### A. The Configuration of the Away-From-Home Calling Market is a Significant Factor in Determining Consumers’ Willingness to Pay for BPP Calling “Convenience”

In any analysis of what price customers are willing to pay for calling convenience, the Commission must take into account the fact that the away-from-home calling market is not a monolithic market based on a singular calling behavior. Rather, there are at least two discrete submarkets, i.e., the calling card market and the bill-to-third/collect market.<sup>60</sup>

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INS at 21-22; CompTel at 20-22; NTI at 7; ONCOR at v, 4, 24-31.

<sup>59</sup>See SNET at 8; CBT at 6-7; Bell Atlantic at 8. Compare FNPRM, 9 FCC Rcd. at 3324 ¶ 15 & n.30.

<sup>60</sup>These might be called the 0+/- markets. USOC, however, suggests another submarket, the 1-800-calling market, made up of those dialing access codes, having pre-paid calling plans, and making collect/bill-to-third calls. See USOC at 5-6. That the Commission’s entire BPP analysis was originally based on something called the “0+” market (only at the FNPRM-stage incorporating the 0-